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No. 77-1826

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.,
*Respondent.***On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit****BRIEF AMICUS CURIAE ON BEHALF
OF THE NATIONAL ASSOCIATION
OF HOME BUILDERS OF THE UNITED STATES
IN SUPPORT OF PETITION FOR A WRIT CERTIORARI**

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June 26, 1978

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Amicus National Association of Home Builders adopts petitioner's statements of Opinions Below, Jurisdiction, Question Presented, Statutory Provision Involved and Statement of the Case.

INTEREST OF AMICUS

This Amicus Curiae brief is respectfully submitted by the National Association of Home Builders of the United States ("NAHB"), with the consent of all the parties to this case, pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States. NAHB is a professional trade association representing the home building industry. With its 678 affiliated state and local associations and over 103,000 members, NAHB is the voice of America's housing industry.

As the representative of the housing industry, NAHB is obliged to express its views on the significance of this case and to urge the Court to accept it for review. NAHB has consistently supported sound and comprehensive home construction techniques. For example, in 1964 we established the NAHB Research Foundation, Inc., a wholly owned subsidiary to test new and innovative construction techniques. The association and its state and local affiliates have also endorsed uniform building and construction codes across the country. However, NAHB's interest in a sound and coherent system of home construction regulation will be severely affected if the decision of the Court of Appeals below is not reversed.

ARGUMENT

When Congress created the Consumer Product Safety Commission ("CPSC"), it limited the agency's regulatory authority to "consumer products." 15 U.S.C. § 2052(a). As the petition of Kaiser Aluminum & Chemical Corporation demonstrates, nothing in the language or legislative history of the Consumer Product Safety Act, 15 U.S.C. §§ 2051, *et. seq.* ("Act"), shows that Congress intended the CPSC to assume a role in the regulation of home construction. Indeed, if anything had occurred during the legislative process to indicate that Congress was considering the creation of a new federal agency to write and enforce national building standards and codes, NAHB and other representatives of the home construction industry would undoubtedly have been active in opposing such involvement in a matter traditionally left to state and local government.

Since 1974, NAHB has repeatedly voiced its concern over the CPSC's attempts to regulate housing construction.¹ NAHB is especially concerned that the decision of the Third Circuit, if left intact, will disrupt the comprehensive and effective system of regulating housing construction that state and local authorities have painstakingly developed over the past several

¹In particular, NAHB's Committees on Building Codes and Consumer Protection have consistently opposed the CPSC's attempts to regulate aluminum branch circuit wiring systems, and passed resolutions to that effect in September 1974 and January 1978, respectively.

decades. Such federal involvement in traditionally state and local matters is not only highly inappropriate in the absence of any explicit Congressional mandate to that effect, *see, e.g.*, *United States v. Bass*, 404 U.S. 336, 349 (1971); *Palmer v. Massachusetts*, 308 U.S. 79, 84 (1939), but will lead to serious and unjustified dislocations in the home construction industry.

First, this is not an area where a federal agency is trying to enter an unregulated field that has "traditionally been left to," but in fact has been ignored by, state and local governments. On the contrary, home construction has long been one of the most highly regulated of industries. Moreover hundreds of state and local government units over the years have developed the needed expertise and devoted the necessary resources to assure that the homes which are built will be safe. State and local governments establish design and construction standards through building codes, issue building permits, license builders, electricians, plumbers and other craftsmen, inspect newly-constructed homes, and enforce this entire range of regulatory requirements. *See generally*, R. Sanderson, *Codes and Code Administration* (1969).² In short, a system which both establishes and enforces codes and standards exists today and there is simply no good reason for the CPSC to thrust itself into the housing construction area.

In fact, there are some very good reasons why the CPSC should *not* become involved. The existing state and local regulatory authorities have the experience and manpower

²With respect to electrical wiring systems, for example, the existing state and local regulatory scheme encompasses: (1) the design and installation requirements of the National Electrical Code, which are usually adopted by state and local authorities either directly or through model building codes, such as the Uniform Building Code, the Building Officials Code Administrators, or the Standard Building Code; (2) licensing requirements for electricians; and (3) the inspection of completed wiring systems in individual homes.

Significantly, in view of the CPSC's allegations concerning aluminum wiring systems, the National Electrical Code has been amended to include special design and installation requirements for such systems. *See* National Electrical Code, arts. 110-14, 210-7(G) and 380-14(a) (4) (1978 ed.).

necessary to operate an effective housing construction program, whereas the CPSC possesses neither the necessary expertise nor the reasonable expectation of acquiring it. As an indication of the extent to which the CPSC's reach exceeds its grasp, over 1.98 million residential units were constructed in this country in 1977, including nearly 1.45 million single-family residences.³ Since the CPSC has only 900 full-time employees,⁴ the agency cannot even attempt to inspect every new home, much less set all the necessary design and performance standards, issue all the necessary building permits, and supervise the necessary professional licensing processes, as well as regulate the multitude of true "consumer products."

However, once the CPSC purports to regulate any "risk" associated with an item over which it claims jurisdiction, all state and local authority to impose any requirement other than one identical to the rule dictated by the CPSC would be explicitly displaced by the preemption provisions of the Act. See Section 26(a), 15 U.S.C. § 2075(a). If, for example, the CPSC purported to deal with the "risk" of electrical wiring fires, it is far from clear that any state or local electrical code requirement—even one dealing with quite a different aspect of electrical installations—would still be valid. This potential danger for disruption of the existing regulatory system is particularly acute since, as we have indicated, the CPSC lacks both the expertise and the resources to make certain that it does not, perhaps inadvertently, open up large and dangerous gaps in the state and local regulatory system.

Furthermore, the entry of this inexpert agency into the housing construction area will engender widespread uncertainty among state and local regulatory authorities, which will not know exactly how particular CPSC regulations will affect their powers.⁵ Even more important, from NAHB's perspective, is

the fact that home builders may soon be faced with numerous conflicts between CPSC standards for the design of building materials and state and local standards governing their utilization during the construction process.⁶ Once again, the CPSC's enabling legislation provides no answer to this conflict of obligations. This silence is a powerful indication that Congress did not intend to create such a conflict.

The CPSC is claiming an apparently universal jurisdiction over everything with which the consumer may conceivably come in contact, including housing and housing components such as electrical wiring systems, architectural glass and roofs.⁷ The CPSC has taken the position that housing and building components are "consumer products" to be treated in the same manner as toasters and lawn mowers. Basic housing components, such as wiring, ductwork, wallboard, bricks and flooring, were never intended to be subject to regulation under the Act. To allow the CPSC to assert jurisdiction in the housing construction area would impose an unconscionable burden on homebuilders who constructed homes in complete conformance with applicable state and local building codes and other regulations.

In summary, NAHB believes that the CPSC's assertion of authority over housing construction, as approved by the Third Circuit, has very serious implications for all aspects of the home construction process. The seriousness and immediacy of the problem warrants the attention of this Court.

³See United States Department of Commerce, Bureau of the Census, *Construction Reports*, Series C-20 (1978).

⁴See the CPSC's *Annual Report for Fiscal Year 1977* at 5 (1978).

⁵The CPSC has already formulated glazing standards for architectural glass which are not consistent with the same requirements in the state and

local building codes. The state and local building officials, generally, continue to enforce their own rather than adopt and enforce the CPSC standards which have no enforcement mechanism provisions.

⁶See Kaiser's Petition at 15-18.

⁷See, e.g., 42 Fed. Reg. 1428 (1977); Record of CPSC action concerning "[w]hether certain prefabricated panels made of a combination of asbestos and cement used on residences and schools in Puerto Rico are consumer products" (June 30, 1977).

CONCLUSION

For the reasons stated above, NAHB respectfully requests the Court to issue a writ of certiorari to review the decision of the Court of Appeals below.

Respectfully submitted,

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